

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

BRIEF FOR APPELLANTS

McG-T-R
9/22/67
(*)

853

UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

155

No. 20,803

WILLIAM D. MITCHELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20,804

EDDIE DEVONE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED JUN 15 1967

Nathan J. Paulson
CLERK

No. 20,805

WAYNE A. BOONE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20,806

LANGFORD BEACHEM,

Appellant,

v.

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On Appeal from the United States District
Court for the District of Columbia

David Booth Beers

734 Fifteenth Street, N.W.
Washington, D. C. 20005

Attorney for Appellants
(Appointed by this Court)

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QUESTION PRESENTED

The question presented on this appeal is:

In a prosecution on a four-count indictment, where appellants were acquitted of three counts and convicted of stealing property of the district of Columbia, was it plain error for the trial court to give instructions to the jury which:

- a) failed to explain all elements of the offense;
- b) failed to require proof of intent to deprive the owner of the property permanently;
- c) failed to require proof of scienter of the ownership of the property by the District of Columbia;
- d) failed to explain the law of self-defense with reference to the offense;
- e) failed to charge on the issue of "defense of another";
- f) failed to charge that the Government must prove each element of the offense beyond a reasonable doubt; and
- g) gave to the jury only the choice of believing the evidence offered by the Government or that offered by appellants on the issue of aiding and abetting.

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BRIEF FOR APPELLANTS

JURISDICTIONAL STATEMENT

On May 9, 1966 the four appellants were charged in a four-count indictment filed in the United States District Court for the District of Columbia with (1) assault with intent to commit robbery (D.C. Code §22-501); (2) robbery (D.C. Code §22-2901); (3) assault with a dangerous weapon (D.C. Code §22-502); and (4) stealing property of the District of Columbia (D.C. Code §22-2206). After pleas of not guilty entered on May 20, 1966, appellants were jointly tried by the Court and a jury commencing on November 7, 1966 and continuing until November 14, 1966. The jury found all the appellants not guilty on the first three counts of the indictment, but found appellants guilty on the fourth count. On January 13, 1967 appellants were sentenced: appellant Mitchell to confinement under the Federal Youth Corrections Act; appellant Devone to confinement for a period of from twenty months to five years; and appellants Boone and Beachem each to confinement for a period of from one to three years. Appeals in forma pauperis were authorized by the District Court for all appellants: appellant Mitchell by Order of January 26, 1967; appellant Devone by Order of January 20, 1967; appellant

Boone by Order of February 6, 1967; and appellant Beachem by Order of February 6, 1967. The jurisdiction of this Court is invoked under 28 U.S.C. §1291. On February 28, 1967 this Court ordered sua sponte that the four appeals be consolidated for all purposes.

STATEMENT OF THE CASE

At about 10:45 P.M. on March 4, 1966, near the corner of 7th and Que Streets, N.W., in the District of Columbia, the complaining witness, Metropolitan Police Officer Spencer, appeared in civilian clothes in his personal automobile. (Tr. 4). The four appellants, males, appeared on the scene dressed in female clothing. (Tr. 4, 8, 13, 183, 195).

The theory of the Government's case was that while Officer Spencer was waiting for a stop light, one of the appellants reached through the window on the right side of the car and unlocked the right doors; and all appellants immediately got in, two in front and two in back, before the officer knew what was happening. The officer felt a hard metal object against the back of his neck and was told to drive on. After a couple of blocks appellant Devone tore the officer's watch off his wrist; a fight with Devone ensued, the officer slamming on his brakes. One of the appellants in the back of the car began hitting the officer on the head with an umbrella. The officer drew his gun and yelled that he was a police officer. Devone grabbed the gun, and the officer was momentarily stunned as appellants fled. As the

officer gave chase he was confronted by appellant Devone pointing the gun at him and threatening to shoot. The officer raised his hands but managed to pull a fire alarm next to him as Devone fled. Other officers arrived on the scene, and after receiving information from a taxicab driver, proceeded to a rooming house at 704 Que Street, N.W. where they found and arrested appellants. The gun was found on the floor in one of the rooms in the house. (Tr. 4-18, 135-41). The principal witness for the Government and the only eye-witness of the offenses charged, was Officer Spencer.

The theory of the defense was based almost entirely upon the testimony of the four appellants. Appellants Devone and Boone came out from the rooming house, dressed in female clothing, intending to walk to a masquerade party. They noticed Officer Spencer, dressed in plain clothes and parked at the curb in a personal automobile. The officer, without identifying himself, asked them where they were going and offered them a ride. Devone and Boone entered the front seat of the car, and the officer agreed to wait for appellants Mitchell and Beachem. When the latter appeared from the rooming house, also dressed in female clothing, Boone made a sign for them to get in the back of the car. As the officer drove on he made suggestive advances to Boone, offered Boone a drink, and took a drink himself from a bottle in a paper bag. After riding a couple of blocks Mitchell shouted that the officer was going in the wrong direction. The officer pulled over to a stop and stated that he could not have sexual relations with all four and that three should get out. Mitchell, Beachem,

and Boone got out and started to leave. While Devone was attempting to get out, the officer drew his gun, yelled for Devone to stay in, and pulled Devone back. During the ensuing struggle between the officer and Devone, Devone cried for help. Boone returned, re-entered the car in the back, and began beating the back of the front seat, not the officer, with the umbrella in an attempt to frighten the officer into releasing Devone. Boone noticed the gun fall loose on the seat between the officer and Devone and picked it up. As Devone struggled free, both he and Boone fled. All appellants ran back to the rooming house, Boone taking the gun for fear of being shot by the officer. The officer did not attempt to identify himself as an officer until after appellants ran from the car. (Tr. 182-194, 227-247, 258-266, 273-282).

Upon this evidence the jury considered instructions on four counts: assault with intent to commit robbery, robbery, assault with a dangerous weapon (including simple assault), and stealing property of the District of Columbia. Instructions were also given on self-defense and aiding and abetting. (Tr. 328-38). The jury acquitted all appellants on the first three counts, but found all guilty on the stealing count. (Verdict).

STATUTE INVOLVED

Section 22-2206 of the District of Columbia Code provides as follows:

"Whoever shall embezzle, steal, or purloin any money, property, or writing, the property of the District of Columbia, shall suffer imprisonment for not exceeding five years, or be fined not more than five thousand dollars, or both."

STATEMENT OF POINTS

Appellants intent to rely upon the following points in these appeals:

It was plain error for the trial court to give instructions to the jury which:

1. Failed to explain the elements of the offense of stealing property of the District of Columbia and to explain that the Government had to prove these elements;
2. Failed to explain adequately the requirements of proof of criminal intent, and gave no instructions on scienter of the ownership of the property by the District of Columbia or on the law of "defense of another;"
3. Failed to charge that the Government must prove each element of each offense charged beyond a reasonable doubt; and
4. Failed to make clear who had the burden of proof on the issue of aiding and abetting or to define that burden.

SUMMARY OF ARGUMENT

I. The instructions of the trial court to the jury with respect to the charge of stealing property of the District of Columbia did not clearly set out the elements of the offense or even state that the Government had to prove any elements of the offense. The key words of the statute and of the indictment, "steal or purloin", were never defined; rather, the court referred to the offense as "larceny" and attempted to define it as "stealing". The jury was not told that the Government must prove a taking, or a carrying away, or that the property belonged to the District of Columbia and had some value, however small, or that the taking and carrying away must have been with the intent to deprive the owner permanently of his ownership rights. No instructions were given with specific reference to the facts of this case. Such a charge to the jury falls far short of the required standards set by this Court in Jackson v. United States, ___ App. D.C. ___, 348 F. 2d 772 (D.C. Cir. 1965); McAfee v. United States, 70 App. D.C. 142, 105 F. 2d 21 (D.C. Cir. 1939); Burd v. United States, 119 App. D.C. 360, 342 F. 2d 939 (D.C. Cir. 1965); Williams v. United States, 76 App. D.C. 299, 131 F. 2d 21 (D.C. Cir. 1942); Byas v. United States, 86 App. D.C. 309, 182 F. 2d 94 (D.C. Cir. 1950); Collazo v. United States, 90 App. D.C. 241, 196 F. 2d 573 (D.C. Cir. 1952).

Moreover, the jury was not instructed that the Government had to prove beyond a reasonable doubt that appellants knew or had reason to believe that the property taken belonged to the District of

Columbia. Since the value of the property taken was only \$54, the specific intent to steal property of the District of Columbia must be proved to justify conviction of a felony under D.C. Code §22-2206. Such a scienter requirement follows from Findley v. United States, 362 F. 2d 921 (10th Cir. 1966), which construed scienter as an implied requirement of 18 U.S.C. §641 which proscribes larceny of federal property. Section 641 was drawn in part from the same statute from which the District of Columbia Code provision was taken. The scienter requirement also follows from Morissette v. United States, 342 U.S. 246 (1952), which also construed 18 U.S.C. §641 as requiring specific intent, and from Pettibone v. United States, 148 U.S. 197, 206 (1893), which held that scienter was required in the analogous offense of assault upon a public officer.

The court's instructions on self-defense, concededly an issue in this case, were wholly inadequate, because they were framed only in the context of a defense to the charge of assault. The language used by the court was not applicable to the evidence on the charge of stealing property, and the language also could have been construed by the jury as not actually permitting the defense to the charge of stealing property. Furthermore, there was substantial evidence that one of the appellants took the gun not only in self-defense, but also in "defense of another" of the appellants. The court's charge on self-defense was not adequate to cover "defense of another", because the appellant who testified that he took the gun was not at the time being assaulted and could have retreated, but for the "defense of another" of the

appellants. Thus, a crucial issue of criminal intent was withheld from the jury improperly. Byrd v. United States, 114 App. D.C. 117, 312 F. 2d 357 (D.C. Cir. 1962); Purdy v. United States, 210 A. 2d 1 (D.C. App. 1965).

II. The court failed to charge the jury that on this four-count indictment the Government must prove appellants guilty of the specific charge of stealing property of the District of Columbia. The court also failed to charge that the Government must prove each element of this offense beyond a reasonable doubt. This was plain error under the standards prescribed by this Court in many cases, including the Williams, McAfee, and Jackson decisions cited above.

III. An aiding and abetting charge was necessary in this case; but the court's instructions on this issue also failed to advise the jury that the Government must prove this element beyond a reasonable doubt. Of even greater significance, the instructions could well be construed as placing the burden of proof upon appellants. For the court charged the jury that "if you believe..." the Government's evidence on this issue, it must convict; and "if you believe..." the appellants' evidence, it must acquit. The jury should have been instructed that so long as thereremained a reasonable doubt about the matter, it must acquit even if it was inclined to believe the Government's version of the facts and disbelieve appellants' version.

ARGUMENT

Introduction.

Upon a four-count indictment charging appellants with robbery, assault with intent to commit robbery, assault with a dangerous weapon, and stealing property of the District of Columbia, appellants were acquitted of the first three counts by the jury and found guilty of the stealing property count. (a violation of D.C. Code §22-2206). These appeals deal with the adequacy and correctness of the trial court's instructions to the jury with respect to Count Four; and we contend that viewed as a whole the charge did not fairly and clearly inform the jury what the Government had to prove for conviction. We also contend that certain individual instructions, taken by themselves, were erroneous and compel reversal. We concede that counsel for appellants in the trial court did not object to the instructions given, but we urge that the errors which we demonstrate below were so fundamental as to constitute plain error under Fed. R. Crim. P. 52(b).

A reading of the instructions in their entirety reveals clearly that Count Four, the stealing property count, was the forgotten step-child of the case. The court's general instructions are at Tr. 322-26;

appellants. Thus, a crucial issue of criminal intent was withheld from the jury improperly. Byrd v. United States, 114 App. D.C. 117, 312 F. 2d 357 (D.C. Cir. 1962); Purdy v. United States, 210 A. 2d 1 (D.C. App. 1965).

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A reading of the instructions in their entirety reveals clearly that Count Four, the stealing property count, was the forgotten step-child of the case. The court's general instructions are at Tr. 322-26;

they are not in issue in this case. The instructions on burden of proof at Tr. 326-27 are very much in issue. Instructions relating to the elements of the first three counts in the indictment, assault with intent to commit robbery, robbery, and assault with a dangerous weapon, are found at Tr. 328-33, but are not in issue. The stealing instruction is at Tr. 333-34. The instruction on aiding and abetting is found at Tr. 335-36, with only one-half a sentence referring to the stealing count, at Tr. 335. Instruction on self-defense, Tr. 336-338, was given with reference to assault, Count Three, with only one-half a sentence referring to the stealing count, at Tr. 336. The foregoing instructions are in issue. Further general instructions not here in issue are found at Tr. 338-43. The instructions pertinent to this appeal are discussed in detail below.

We demonstrate that the instructions given (1) failed to explain to the jury the elements of the offense of stealing and what elements the Government had to prove; (2) failed to explain adequately what was required to prove criminal intent, giving no instructions on scienter of the ownership of the property or the law of defense of another; (3) did not tell the jury that the Government must prove each element of each offense charged beyond a reasonable doubt; and (4) were unclear as to who had the burden of proof on the aiding and abetting issue.

I. Elements of the Offense. (See Tr. 333-38)

1. We think it fair to state that the elements of the offense of stealing property of the District of Columbia, in this case the police

officer's pistol, are at least the following: (1) ownership of the property by the District of Columbia; (2) some value of the property, however small; (3) a taking of the property by appellants; (4) a carrying away of the property by appellants; and (5) criminal intent in the taking and carrying away, which may be inferred from the intent to deprive the owner of the property of his ownership rights permanently and without justification.

The instructions on the elements of this offense are quite brief, and they are set forth in their entirety:

"Now, the fourth count alleges larceny of property in the District of Columbia, and that alleges that on or about March 4, 1966, within the District of Columbia, the four defendants did steal and purloin the property of the District of Columbia, a municipal corporation, having a total value of about \$54.00 consisting of one pistol of that value.

"Now, in order to constitute larceny, the taking of property must be accompanied with the intent to steal it. The intent of the taker must be to appropriate the stolen property to a use inconsistent with the property rights of the person from whom it is taken. If the taking is under a bona fide claim of right, however, unfounded it is not larceny because it negates an intent to steal. In other words, if a person honestly thinks that he

is entitled to take the property, taking is not larceny if he is mistaken in that belief."

"Now, larceny from the District of Columbia is simply larceny of property which belongs to the District of Columbia, and in this case, allegedly the pistol."
(Tr.333-34).

"Now it is also the contention of the defendants that they acted in self-defense at the time of the occurrences alleged here. I will instruct you as to the law of self-defense.

"If a defendant did not provoke an assault and incidentally, the self-defense would apply as to the third count, and not to any of the other counts, although it could apply to the larceny of the pistol, if they thought it was necessary to take it away for their protection."
(Tr. 336-37).

It is unquestionably the law in this Circuit that the trial judge must explain to the jury the nature of the offense charged with clarity. Jackson v. United States, ___ App. D.C. ___, 348 F.2d 772 (D.C. Cir. 1965); Byrd v. United States, 119 App. D.C. 360, 342 F. 2d 939 (D.C. Cir. 1965). And the jury must be told that every element of the offense, including every material fact, must be proved by the Government. Williams v. United States,

76 App. D.C. 299, 131 F. 2d 21 (D.C. Cir. 1942); McAfee v. United States, 70 App. D.C. 142, 105 F.2d 21 (D.C. Cir. 1939); Byrd v. United States, 86 App. D.C. 309, 182 F.2d 94 (D.C. Cir. 1950); Jackson v. United States, supra; Byrd v. United States, supra. As both the Byrd and Jackson cases reveal, a defendant has the right to

"...proper instructions on each element, even though no request is made by defense counsel."

Jackson v. United States, supra, 348 F. 2d at 773.

When viewed in the light of the standards enunciated by this Court, the instructions on the stealing count were woefully inadequate. The language of the indictment read in the instruction was taken from the statute and uses the key words "steal and purloin." These words were never defined in the instructions, and "purloin" was never used. Rather, the court characterized the offense as "larceny", which is not used either in the statute or the indictment, and attempted to define it in terms of "taking.. . . . with the intent to steal...." (Tr. 333). Nowhere was it stated that the Government must prove a taking or a carrying away: a taking seems to be assumed, and a carrying away is not mentioned. The intent to steal was not actually defined; rather, it was merely stated that

"The intent of the taker must be to appropriate the stolen property to a use inconsistent with the property rights of the person from whom it is taken."
(Tr. 333). (Emphasis added).

Even if each juror could understand the heavy language used by the court, the fact remains that the elements of the offense were neither set forth nor explained.

The jury was not told that the taking and carrying away had to be with the intent to appropriate the property permanently. See 2 Wharton, Criminal Law §454 (Anderson ed. 1957). This issue was a critical one in light of appellants' theory of the case that Boone did not take the gun with the intent to steal it, but rather only because of his fear of leaving the gun in the possession of the officer with whom Devone was struggling. (See Tr. 263, 264, 267, 268). Boone testified that after taking the gun and returning to the rooming house, he did not even attempt to hide the gun, but rather placed it on a table in plain sight; and that there were people in the house, including the tenant, who were not involved in these events. (Tr. 264). Clearly an issue as to criminal intent to steal the gun was presented and which can hardly be said to have been submitted to the jury under the court's instructions set forth above.

Moreover, the jury was not charged with respect to the facts of this case in any other respects. See Collazo v. United States, 90 App. D.C. 241, 196 F.2d 573 (D.C. Cir. 1952). The only matter even remotely connected to the evidence of the case was one general statement:

"Now, larceny from the District of Columbia
is simply larceny of property belonging to the
District of Columbia, and in this case, allegedly the

pistol." (Tr. 333-34).

The jury was not even charged that the Government had to prove that the property taken was the property of the District of Columbia or that it had some value, both of which are essential elements of this offense. The fact that appellants offered no evidence on this issue is of course no excuse. Byrd v. United States, *supra*, 342 F. 2d at 941-2. In short, the instructions contained no statement that the Government had to prove anything, let alone any element of the offense charged or any material fact in this case.

2. The Government was also required to prove that appellants knew or had reason to believe that the property in question, the officer's pistol, was property of the District of Columbia. The testimony of the Government was to the effect that the pistol had a value of \$54. (Tr. 11). Appellants could of course have been charged with petit larceny under D.C. Code §22-2202. Specific intent in the taking of the pistol would have had to be proved, but not ownership, Morissette v. United States, 342 U.S. 246 (1952); and the offense would only have been punishable as a misdemeanor. However, the Government elected to try appellants on a felony charge under the more specific statute proscribing the stealing of property of the District of Columbia. Proof of the specific intent of stealing District of Columbia property was required. Although we are aware of no decision in this Circuit on the matter, it is apparent that D.C. Code §22-2206, as enacted in the District of Columbia Code of 1901, 31 Stat. 1324, §831, was taken from the Act of March 3, 1875, 18 Stat. 478, proscribing larceny

of property owned by the United States. The legislative history of that statute is meager and unenlightening. See Morissette v. United States, supra, 342 U.S. at 266, n. 28. However, the recent case of Findley v. United States, 362 F. 2d 921 (10th Cir. 1966) dealt with a larceny prosecution under a successor statute, 18 U.S.C. §641, specifically for selling property of the United States without authority. Section 611 does not mention either criminal intent or guilty knowledge, but proof of both is nevertheless required. Morissette v. United States, supra. The Court of Appeals in Findley reversed the conviction for failure to instruct the jury that the Government must prove such guilty knowledge beyond a reasonable doubt.

The Court stated:

"In view of the fact that criminal intent and guilty knowledge are necessary ingredients of the offense charged, it was incumbent upon the trial judge to advise the jury, that in addition to the elements he enumerated, it was necessary for the government to prove beyond a reasonable doubt that the defendant knew that the property involved, belonged to, and was stolen from, the government."

362 F. 2d at 922-23. ^{1/}

^{1/} It may be that the issue of scienter in a prosecution for assaulting a police officer under D.C. Code §22-505 provides a close analogy. This issue has divided the Courts of Appeal which have considered it; see the cases collected and discussed in United States v. Lombardozzi, 335 F. 2d 414 (2d Cir. 1964), and United States v. Wallace, 368 F. 2d 537 (4th Cir. 1966). We do not believe that this Court has passed upon the question in any reported decision. Despite the recent views of the Courts of Appeals for the Second and Fourth Circuits in the cases cited above, we submit that the matter is still controlled and scienter required by Pettibone v. United States, 148 U.S. 197, 206 (1893).

We think that the same result must be reached under D.C. Code §22-2206. If anything, the argument for the scienter requirement under this Code is stronger. The original federal statute, 18 Stat. 479 (1875), could be justified on the ground that ordinary larceny was not a federal matter; and Congress could provide a federal forum to prosecute the offense of larceny when the property taken belonged to the United States, instead of merely trusting to the states to prosecute such offenses. See United States v. Lombardozzi and United States v. Wallace, cited in the note, for this rationale with respect to assaults on federal officers. But that purpose was inapplicable to the first District of Columbia Code upon its enactment in 1901; for D.C. Code §22-2201 and 22-2202 provided penalties and a federal forum for grand and petit larceny in the District of Columbia. The only useful purpose for retaining all three statutory provisions could have been to impose the penalty of punishment as a felony upon those who would knowingly steal property of even the slightest monetary value from District of Columbia government. But where the accused has no basis for knowing the ownership of the property taken, he cannot have intended to do the thing which the statute specially proscribes. A conviction for such a felony without scienter would thus be based upon chance. This result is forbidden by our notions of fairness which require that a man be plainly apprised of the consequences of the act he intends.

2/ Since the crime of larceny requires proof of specific criminal intent, regulatory crimes which are mala prohibita are "not relevant to our present problem." Morissette v. United States, *supra*, 342 U.S. at 251.

In the present case the issue was squarely presented by the evidence on the question of whether or not appellants knew or had reason to believe the complaining witness was a police officer. The officer testified that he revealed his identity to appellants as soon as the fight in the car began, before he drew his pistol. (Tr. 6). On the other hand, appellant Mitchell testified that he "never heard [the officer] say anything about he was a police officer." (Tr. 206). Devone testified that the officer only stated who he was after Devone had left the car and was running away. (Tr. 231, 232). Neither Boone nor Beachem was asked any questions on this matter. It is obvious that the crucial factual issue was not presented for the jury's determination by the instructions; and since acquittal was required if they believed appellants' version of the facts, plain error is evident.

3. Although the trial court gave instructions to the jury on the issue of self-defense in this case, the court for all practical purposes confined the issue to Count Three which charged assault. The passing reference to the stealing property count was wholly inadequate to place the issue in its proper relationship to the proof of criminal intent required for conviction on this count.

The instructions on self-defense were only given in the context of a defense to assault. (Tr. 336-38). The elements of assault were explained; and the elements of provoking the assault, reasonable belief in the likelihood of death or serious bodily injury, retreat, necessity, and use of force and a dangerous weapon were all explained with reference to the evidence of assault by appellants upon the police officer. The court initially expressly limited the defense to the assault count, only parenthetically attempting to give it application to the stealing count:

"If a defendant did not provoke an assault and incidentally, the self-defense would apply as to the third count, and not to any of the other counts, although it could apply to the larceny of the pistol, if they thought it was necessary to take it away for their protection." (Emphasis added). (Tr. 336-37).

There was no other mention of Count Four.

The manner in which the court limited the instruction to Count Three and parenthetically reversed itself in an attempt to include Count Four could only serve to create confusion in the minds of the jury, especially

in a complex set of instructions on a four-count indictment. The matter was further confounded by the court's failure to mention Count Four in this connection again and by returning immediately to the assault context. The court's language quoted above was immediately followed by a sentence beginning: "If a defendant did not provoke an assault..." (Tr. 337). A few lines further the jury was told that a "defendant" could "meet force with force and meet any attack upon him...." (Tr. 337). Moreover, under the court's instructions all that appellants were permitted to do in resisting the officer was to "meet force with force," "meet any attack...with ...force," (Tr. 337), and employ" the use of force and of a dangerous weapon." (Tr. 338). Taking the gun is never mentioned! The instructions given on self-defense were thus wholly useless in presenting the issue of self-defense on Count Four for the jury.

Since the court did not define "steal" or "purloin" for the jury, use the term "criminal intent," or charge on intent to deprive the owner permanently, the jury could have convicted appellants for stealing the gun even if it believed that appellants did not provoke any assault and would not have taken the gun had they not been afraid of being shot by the officer as they fled. To prevent this result, appellants were entitled to a clear and meaningful instruction on the self-defense issue as it related to the stealing charge; and failure so to instruct was under these circumstances a fundamental error.

4. Appellants' defense below was not entirely based upon "self-defense", but also upon the related doctrine of "defense of another." Appellant Boone testified that he left the car when asked to do so by the officer. However, he heard Devone "hollering;"

"...one of you to come back and help me...and I came back and got in the back seat and I had an umbrella and I was banging on the back seat trying to scare the man into letting him go."

(Tr. 262-63).

Boone further testified that he picked up the gun when it fell loose between the officer and Devone while they were struggling in the front seat. (Tr. 263). He picked it up "because both of them was throwing kind of crazy punches." (Tr. 267). As Boone fled the officer chased after him; and Boone stopped for nothing until he reached the rooming house. He testified, "I was too scared to stop." (Tr. 268). Upon this evidence the issue of criminal intent in the taking of the gun ought clearly to have been considered by the jury in the light of Boone's contention that the reason he took the gun was to protect Devone, as well as himself. The court's instructions, however, were silent on this issue.

The doctrine of "defense of another" is a well recognized defense, Clark & Marshall, Crimes §5.11 (6th ed. 1958); and it is the law in this Circuit. Byrd v. United States, 114 App. D.C. 117, 312 F. 2d 357 (D.C. Cir. 1962); Purdy v. United States, 210 A. 2d 1 (D.C. App. 1965). That the error in failing to charge the jury on this issue was prejudicial is not difficult to see. Even if the instructions on self-defense had some meaning to the jury on the stealing count, the jury might well have

rejected the defense on the ground that Boone was not being assaulted by the police officer and could have retreated, since he had left the car before the fight with Devone actually commenced. The jury was charged that self-defense "is a law of necessity" and that "there must appear no other alternative in defending one's self before the use of force and of a dangerous weapon will be justified as excuseable." (Emphasis added). (Tr. 338). Since the jury was not charged that if it believed Boone's testimony it might acquit on the ground that Boone's conduct in removing the gun from the fight without force to protect Devone was justified, appellants were denied the right to have a vital issue of fact determined by the jury. We submit that error on this issue of itself compels reversal of the convictions.

II. Burden of Proof. (See Tr. 325, 326, 328, 330, 338)

Perhaps no error is as prejudicial as the failure to define for the jury in the ~~klearest~~ of terms the burden of proof which the Government must bear in a criminal case. We have set forth above our contentions as to the instructions on the elements of the offense for which appellants were convicted to demonstrate the confusion which resulted in this case by all but ignoring the stealing property count. We now demonstrate that the court failed to charge that the Government's burden of proof beyond a reasonable doubt applied to each count of the indictment, and also failed to charge as to any count that the Government must prove each element of the offense charged beyond a reasonable doubt.

The court attempted to charge the jury in the beginning of the instructions on burden of proof as to all counts at the same time. The pertinent portions of the charge are discussed below.

At Tr. 325 the court first mentioned burden of proof:

"In determining whether the Government has established the charge or any of the charges against the defendants beyond a reasonable doubt, you will consider and weigh the testimony of all the witnesses who have testified before you...."

At Tr. 326 the court continued:

"The burden is on the Government to prove the defendants guilty beyond a reasonable doubt, and if the Government fails to sustain this burden, then you must find defendants not guilty."

Beginning at Tr. 326 "reasonable doubt" was defined as a general matter, without mention of the charges in this case. At Tr. 328 the court charged that to find appellants guilty of robbery,

"you must find that the Government has proved beyond a reasonable doubt that the defendants, in the District of Columbia, took something of value from the complainant,...[other elements of that offense]."

This instruction is of course not directly in issue on this appeal, but we note that it is insufficient in that it does not charge that the Government must prove each of the elements beyond a reasonable doubt.

A more nearly correct charge was made with respect to assault with intent to commit robbery:

"The only two elements which the Government must prove beyond a reasonable doubt, in order for you to find the defendants guilty as charged under [this count]" (Tr. 330).

No further instruction on burden of proof was given with respect to either Count Three (assault with a dangerous weapon) or Count Four (stealing property of the District of Columbia); except that the following instruction was given with respect to self-defense:

"Now if as a result of all the evidence or lack of evidence a reasonable doubt has been engendered in your mind as to whether the defendants acted in self-defense, that doubt must be resolved in favor of the defendants, bearing in mind that the burden is upon the Government to establish that the defendants did not act in self-defense." (Tr. 338).

No further instructions were given on burden of proof.

Thus we see that nowhere did the court tell the jury that the Government must prove appellants' guilt specifically on Count Four of the indictment beyond a reasonable doubt. Nowhere did the court charge that the Government must bear its burden of proof as to each element of the offense charged. This was plainly prejudicial error. Williams v. United States, 76 App. D.C. 299, 131 F. 2d 21 (D.C. Cir. 1942); McAfee v. United States,

70 App. D. C. 142, 105 F. 2d 21 (D.C. Cir. 1939); Johnson v. United States, 100 App. D.C. 333, 244 F. 2d 781 (D.C. Cir. 1957); Jackson v. United States, App. D.C. _____, 348 F. 2d 772 (D.C. Cir. 1965); Byrd v. United States, 119 App. D.C. 360, 342 F. 2d 939 (D.C. Cir. 1965).

III. Aiding and Abetting. (See Tr. 334-36)

It was recognized at the trial below that only one of the appellants could have actually taken the gun. Although Boone testified that he took it (Tr. 263), the complaining witness testified that it was taken by Devone (Tr. 13), and Mitchell testified that he saw Devone with the gun in his hand while fleeing from the car (Tr. 209). The court first instructed the jury on aiding and abetting in general (Tr. 334-35), but neither in this portion of the charge nor in any other portion did the court instruct that the Government's burden of proof was applicable to this issue. We submit that this failure of itself was prejudicial error requiring reversal for the reasons set forth in Part II above.

An even more serious error resulted from the court's charge on aiding and abetting with specific reference to the facts of this case. With respect to the robbery and assault with intent to commit robbery counts, the court charged in part as follows:

"If you believe that the four defendants...got in the car. . .
.. and with the intent to rob him, or in fact did rob
him, and that when they got in the car they intended
to participate in this thing, or to have one or more of

them participate in it, then they would be guilty of aiding and abetting in the crime...." (Tr. 335).

No reference was made to burden of proof; all that was said to the jury was "If you believe...." Similar language was used with respect to aiding and abetting in assault with a dangerous weapon, but without even language similar to "If you believe....". The court added:

"...and the same applies generally to the fourth count as to the stealing of the pistol." (Tr. 335).

The court then posed the other side of the coin in the same terms:

"Of course, if you believe the defendants' testimony that they got in the car perfectly innocently to be carried to a cabaret, then, of course, they had no necessary intent to commit any of these crimes, such as would permit you to find the defendants guilty under the aiding and abetting, although you could find a defendant who actually did the things that constitute the element of the crime, guilty." (Tr. 335-36).

Not only was the essential burden not placed upon the Government to prove the elements of aiding and abetting beyond a reasonable doubt, the court's language is susceptible of being construed to place the burden of proof upon appellants! The jury of course did not have to believe "the defendants' testimony that they got in the car perfectly innocently" in order to acquit.

Rather, even being strongly inclined to disbelieve appellants and to believe the police officer, the jury had only to have a reasonable doubt about the matter to entitle appellants to an acquittal. The failure so to charge constitutes the most fundamental deprivation of appellants' right to a fair trial.

CONCLUSION

This Court in Williams v. United States, supra, made it clear that in this Circuit the jury in a criminal case must be told "at least once, in some unequivocal language" that it must acquit if it believes that the Government "has not proved each and every element of the crime beyond a reasonable doubt." 131 F. 2d at 22. We have demonstrated above that the jury in this case was told nothing of the kind. This Court's language in the Williams case is equally applicable here to the forgotten count of stealing property of the District of Columbia:

"The failure to make such a statement was especially harmful in this case. First, several possible offenses were included and such a statement must go to each of them. Second, the crimes with their constituent elements were not defined, so the jury could not possibly apply this proper reasonable doubt

^{3/} Inasmuch as the jury's consideration of the evidence in this case cannot be speculated upon in light of the acquittals on the first three counts, and considering also the conflict in the testimony as to who actually took the gun from the police officer, a reversal as to all four appellants is required.

instruction. Third, the charge as a whole gives the impression of a tacit assumption that some kind of verdict of guilty would be returned." 131 F. 2d 22-23.

For these reasons the convictions of each of the appellants should be reversed.

Respectfully submitted,

Dated: June 13, 1967

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734 Fifteenth Street, N.W.
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Attorney for Appellants
(appointed by this Court)

CERTIFICATE OF SERVICE

I hereby certify that I have this 13th day of June, 1967 served the foregoing Brief for Appellants upon appellee by causing copies thereof to be delivered to the office of its attorney, Ralph Q. Nebeker, Esquire, United States Court House, Washington, D. C.

David Booth Beers

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BRIEF FOR APPELLEE

**United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT**

No. 20,803

WILLIAM D. MITCHELL, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,804

EDDIE DEVONE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,805

WAYNE A. BOONE, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

No. 20,806

LANGFORD BEACHAM, APPELLANT

v.

UNITED STATES OF AMERICA, APPELLEE

**Appeal from the United States District Court
for the District of Columbia**

**United States Court of Appeals
for the District of Columbia Circuit** **DAVID G. BRESS,**
United States Attorney.

FILED JUL 20 1967

**FRANK Q. NEBEKER,
VICTOR W. CAPUTY,
Assistant United States Attorneys.**

Norman J. Paulson
CLERK

QUESTIONS PRESENTED

In the opinion of appellee, the following questions are presented:

(1) Where appellants expressed satisfaction with the trial court's instructions to the jury, may they challenge them on appeal?

(2) When the instructions are viewed in their entirety, did the court commit plain error in any of its charges? Specifically, was there plain error in the larceny charge which briefly related elements already defined and elaborated in detail for the jury? Was there plain error in the charge on burden of proof which applied generally to every count and which was several times reiterated in the course of the instructions? Was there plain error in the self-defense charge which was applied to both assault and larceny counts, and which did not exclude the concept of defense of another? Was there plain error in the charge on larceny of the pistol from the District of Columbia which did not require the jury to find that appellants at the time of stealing knew the identity of the owner proven at trial?

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UNITED STATES OF AMERICA, APPELLEE

Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

(1)

COUNTERSTATEMENT OF THE CASE

The grand jury indicted these four appellants in separate counts for assault with intent to commit robbery (22 D.C. Code § 501), robbery (22 D.C. Code § 2901), assault with a dangerous weapon (22 D.C. Code § 502), and stealing property belonging to the District of Columbia (22 D.C. Code § 2206). The indictment grew out of an altercation at Fifth and Q Streets, N.W. on the evening of March 4, 1966 between off-duty plainclothes policeman Leo Spencer and the four appellants, who had entered his car. At the end of the struggle, Officer Spencer's service revolver was forcibly carried away by one of the appellants. Summoned by Spencer, the police directed to 704 Q Street, N.W. by Joe Vines, a taxicab driver who had seen appellants run into that house (Tr. 101-05). Appellants were found hiding in various parts of the house, partially clad in female apparel (Tr. 138, 140, 162, 168), and Officer Spencer's revolver was recovered on the premises (Tr. 137, 264). Appellants were arrested and identified by Spencer (Tr. 169-70).

Officer Spencer testified that while driving home from work at about 10:45 p.m., he stopped for a traffic light at Seventh and Q Streets, N.W., where the four appellants, dressed as females, suddenly entered his automobile (Tr. 29, 55). He felt a hard metal object at his back, and was ordered to drive on. As the car approached Fifth and Q Streets, the intruder seated next to him grabbed at his watch. Spencer slammed on his brakes, stopping the car several feet from the curb, and announced that he was a policeman. He was then struck repeatedly, from the front and back, and yoked with an umbrella. He tried to draw his service revolver, but was momentarily stunned and rolled from the car. (Tr. 4-7, 29-39, 79-80.) Upon regaining full consciousness, he discovered his revolver had been taken, and pursued his assailants, only to be halted by Devone who, brandishing the pistol at Spencer, threatened to kill him (Tr. 7,

11-12). Spencer summoned assistance by breaking a nearby fire alarm box, and Devone fled (Tr. 7).

The case for the appellants consisted principally of their own testimony, each taking the stand in his behalf. They claimed that, attired in female clothing, they left Devone's apartment to attend a musical cabaret (Tr. 183-85, 280). Devone and Boone went downstairs, and near Seventh and Q Streets were approached by Officer Spencer who stopped his car and offered to drive them to their destination (Tr. 228-29, 259). At Devone's request, Spencer waited until Mitchell and Beacham arrived moments later, and all four appellants entered the car (Tr. 249-50, 283-84). Appellants asserted that as Spencer drove down Q Street, he took a drink from a bottle of whiskey, offered Boone a drink, and made obscene gestures and proffers to him (Tr. 233, 262, 277-78). A few blocks later, Mitchell complained that they were going in the wrong direction (Tr. 186), and Spencer loudly rebuked him, pulled over to the curb, and asked all but one of the appellants to leave the car, since he could not have sexual relations with all of them (Tr. 230-31, 252-53). According to this version, Mitchell and Beacham ran up the street (Tr. 278-80); Boone left the car, but as Devone tried to depart, Spencer grabbed him (Tr. 189, 230). A fight ensued during which Boone returned to assist Devone by banging an umbrella on the seat behind Spencer (Tr. 263). When Spencer's gun fell free, so Boone and Devone testified, Boone picked it up and carried it off as he and Devone fled the scene (Tr. 235, 253-54, 267). Mitchell testified, however, that Devone took the gun (Tr. 208, 211).

After the closing statements, the judge charged the jury. Defense counsel were given an opportunity to request new or amended instructions, and the one request which was made was accepted. All four defense counsel expressed satisfaction with the instructions as given. (Tr. 338-39.) The jury acquitted appellants of robbery, assault with intent to commit robbery, and assault with a dangerous weapon, but convicted them of stealing property belonging to the District of Columbia. Judgment

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was entered on January 13, 1967. Devone was sentenced to twenty months to five years imprisonment, Boone and Beacham to one to three years, and Mitchell was confined under the Federal Youth Corrections Act. The convictions are the subject of this appeal.

STATUTE INVOLVED

Title 22, District of Columbia Code, § 2206, provides:

Whoever shall embezzle, steal, or purloin any money, property, or writing, the property of the District of Columbia, shall suffer imprisonment for not exceeding five years, or be fined not more than five thousand dollars, or both.

SUMMARY OF ARGUMENT

Since they accepted the instructions below, appellants may not now challenge them unless they can demonstrate an error which substantially tainted the entire trial. No such error is revealed by the record.

Appellants' major attack on the instructions is premised upon considering each charge in isolation from the other instructions. The instructions must, however, be analyzed as a unit. *Kinard v. United States*, 69 App. D.C. 322, 101 F.2d 246 (1938); *Nixon v. United States*, 114 U.S. App. D.C. 21, 309 F.2d 316 (1962); *Carey v. United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961). So construed, it is clear that the instructions as to the elements of stealing property belonging to the District of Columbia were adequate. Both essential elements of that offense here challenged, "taking" and "intent to deprive," were clearly and succinctly stated during the court's charge to that count, and had in any event been fully defined and elaborated in earlier charges.

Similarly, a lengthy and specific charge at the outset of the instructions, relating to all counts of the indictment, made it clear to the jury that the Government had the burden of proving each element beyond a reasonable

doubt. Even though the charge on count four did not itself contain any explicit directives about the reasonable doubt requirement, the opening charge combined with repeated emphasis of the requirement in other parts of the court's instructions dispelled any possible uncertainty in the jury's mind as to its applicability to all elements of each count. *Carey v. United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961).

The court's charge on self-defense was unexceptionable, for it clearly stated all prerequisite elements of that defense, *Josey v. United States*, 75 U.S. App. D.C. 321, 135 F.2d 809 (1943), and how they related to stealing the pistol. Nor did it exclude the concept of defense of another.

Finally, appellants would have this Court declare that to convict under 22 D.C. Code § 2206, the jury must find that appellants knew the property taken belonged to the District. *Morissette v. United States*, 342 U.S. 246 (1952), relied upon extensively by appellants, does not support this proposition. *Morissette* was concerned with the danger of "sweeping out of all federal crimes . . . the ancient requirement of a culpable state of mind." 342 U.S. at 252. But in the case at hand, the jury found that appellants had the specific criminal intent to steal the property of another *and* that the District of Columbia owned that property. Unlike *Morissette*, appellants were not innocent of all criminal purpose, and the rule of that case does not extend to them.

ARGUMENT

I. Having expressed satisfaction with the trial court's instructions, appellants may not challenge them on appeal absent a showing of plain and substantial prejudicial error.

This Court has recently reaffirmed the principle, inherent in Fed. R. Crim. P. 30, that an appellant is normally foreclosed from attacking instructions which he accepted at trial. *Kelly v. United States*, 124 U.S.

App. D.C. 44, 361 F.2d 61 (1966); *Rivera v. United States*, 124 U.S. App. D.C. 99, 361 F.2d 553, cert. denied, 385 U.S. 938 (1966); *Williams v. United States*, 116 U.S. App. D.C. 131, 321 F.2d 744, cert. denied, 375 U.S. 898 (1963). Adherence to this rule permits the trial judge to hear objections and make corrections during trial, obviating unnecessary appeals and new trials. See *Villaroman v. United States*, 87 U.S. App. D.C. 240, 241, 184 F.2d 261, 262 (1950). An appellate court should reverse only when the error is so "crucial to the whole case", *Barfield v. United States*, 229 F.2d 936, 940 (5th Cir. 1956), that there is substantial probability that the jury was misled to appellants' prejudice. Had there been such errors in this case, it is extremely likely that trial counsel, who showed themselves alert and able throughout the trial,¹ would have raised objection. That all four defense counsel expressed satisfaction with the instructions is a strong indication that appellants were not prejudiced. *Robertson v. United States*, 124 U.S. App. D.C. 309, 364 F.2d 702 (1966). And careful examination of the instructions discloses no errors of a plainly prejudicial magnitude, as appears hereafter.

II. When the instructions of the trial court are considered in their entirety, no plain error can be found.

(Tr. 326-27; 328-29; 331-32; 334-36.)

Appellant challenges the court's charge to the fourth count of larceny from the District of Columbia by isolating it from the rest of the instructions, thus ignoring the well-founded rule that instructions should be considered in their entirety by a reviewing court. *Kinard v. United States*, 69 App. D.C. 322, 101 F.2d 246

¹ The record reveals that all defense counsel were fully effective in presenting appellants' case. Among other things, they conducted thorough cross-examination, made numerous objections to the questions of the prosecutor, and successfully kept appellants' statements to police officers after their arrest from being introduced to impeach their testimony.

(1938); *Levin v. United States*, 119 U.S. App. D.C. 156, 338 F.2d 265 (1964); *Nixon v. United States*, 114 U.S. App. D.C. 21, 309 F.2d 316 (1962). This principle seems particularly applicable where, as in this case, the instructions were comparatively short, minimizing any possible misunderstanding of them by the jury. When prior and subsequent instructions relating to the whole are read as part of the charge to count four, *Linder v. United States*, 268 U.S. 5 (1925); *Carey v. United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961); *Askins v. United States*, 97 U.S. App. D.C. 401, 231 F.2d 741, cert. denied, 351 U.S. 989 (1956), appellants' claim of plain error is bootless.

A. *The Elements of the Crime.*

In breaking the fourth count into its constituent elements, the court below charged the jury that for conviction, there must be a "taking . . . with the intent to steal," and that the defendants must "appropriate the stolen property to a use inconsistent with the property rights of the person from whom it is taken" (Tr. 333). Although attacked as insufficient by appellants,² this instruction concisely elucidates the essential requirements of a stealing offense. The Supreme Court has defined stealing as "tak[ing] away from one in lawful possession with the intention to keep wrongfully." *Morissette v. United States*, 342 U.S. 246, 271 (1952) (emphasis added).³ See also *United States v. Kemble*, 197 F.2d 316, 321 (3d Cir. 1952); *Pennsylvania Indemnity Fire Corp. v. Aldridge*, 73 App. D.C. 161, 162-63, 117 F.2d 774, 775-76 (1941). These two elements, taking and intent, had already been elaborately discussed in other parts of the court's charge,⁴

² Brief for Appellants, pp. 10-15.

³ The Supreme Court took this language from *Irving Trust Co. v. Leff*, 253 N.Y. 359, 364, 171 N.E. 569, 571 (1930).

⁴ The charge to the robbery count defined taking as follows:

In order for you to find the defendants or any one of them guilty of robbery, you must find that the Government has

and no detailed repetition should have been necessary in the fourth count. Moreover, appellants' contention that it was error for the court to discuss "stealing" as larceny⁵ must be rejected, since at common law and under related federal statutes "stealing generally imports larceny". *United States v. Trinder*, 1 F. Supp. 659, 660 (D. Mont. 1932). No instructions on larceny as such were given aside from those on the fourth count, so the

proved beyond a reasonable doubt that the defendants, in the District of Columbia, took something of value from the complainant, that they took it unlawfully and with intent to convert it to their own use or purpose,

Now, as to the first element, that the defendants took something of value, the value of the thing taken, which in the second count is alleged to have been a pistol, is of no importance providing you should find that they took it and it had some value.

As to the second element, that they took the property unlawfully and with the intent to convert it to their own purpose, intent ordinarily cannot be proved directly because there is no way of fathoming and scrutinizing the operations of the human mind, but intent may be deduced from circumstances and from things done and from things said, and it may be inferred that a person intends the natural and probable consequences of their [sic] act. . . . (Tr. 328-29.)

* * * *

The charge concerning intent is concededly adequate, unless the jury should have been required to find that appellants knew the property belonged to the District of Columbia. See *infra* pp. 14-17. The charge given is as follows:

Now, the question for you to decide, as to intent, is what was the intent of the defendants with which they did the act, if they did the acts on the date specified?

In that regard, take into consideration all the testimony of the case to arrive at the intent they had in mind.

Intent ordinarily cannot be proved directly because there is no way of fathoming or scrutinizing the human mind, but intent may be deduced from circumstances, from things done and from things said, and it may be inferred that a person intends the natural and probable consequences of his act. Intent means that a person had the purpose to do a thing. It means that he makes an act of the will to do a thing. It means that he consents to the doing of it. (Tr. 331-32.)

⁵ Brief for Appellants, p. 13.

jury could not have been misled by inconsistent explanations elsewhere.

The succinctness of the instruction on taking, even if regarded as somehow inadequate, cannot be plain error. Not only did appellants raise no objection to the instructions, they also admitted the physical taking of the revolver. (Tr. 208, 235, 253-54.) There was therefore no dispute on which the jury could reasonably have doubted the proof on the taking element.⁶ *Womack v. United States*, 119 U.S. App. D.C. 40, 336 F.2d 959 (1964); *Heideman v. United States*, 104 U.S. App. D.C. 128, 131, 259 F.2d 943, 946, cert. denied, 359 U.S. 959 (1958); see also *McDonald v. United States*, 114 U.S. App. D.C. 120, 122, 312 F.2d 847, 849 (1962) (*en banc*). The case now before the Court is readily distinguishable from *Byrd v. United States*, 119 U.S. App. D.C. 360, 342 F.2d 939 (1965), and *Jackson v. United States*, 121 U.S. App. D.C. 160, 348 F.2d 772 (1965), where the trial court failed to give any instructions at all concerning an element very much in issue.

B. *The Burden of Proof.*

Appellants complain that the jury was not instructed that the Government must prove each element in issue beyond a reasonable doubt.⁷ Taking the instructions as a whole, however, this claim is muted by the lengthy instructions which the trial judge gave at the outset concerning the burden of proof and reasonable doubt. He advised the jury that:

[E]very defendant in a criminal case is presumed to be innocent and this presumption of innocence

⁶ Similarly, the fact that the object taken has some value can be presumed from its utility. *Lanham v. Commonwealth*, 250 Ky. 500, 63 S.W. 2d 585 (1933); *State v. Broom*, 135 Ore. 641, 297, Pac. 340, 342 (1931). It was therefore not in issue, and appellants' attack on the court's failure to give a charge concerning value must fail. (Brief for Appellants, p. 7.)

⁷ Brief for Appellants, pp. 22-25.

attaches to the defendant throughout the trial. The burden is on the Government to prove the defendants guilty beyond a reasonable doubt, and if the Government fails to sustain this burden, then you must find the defendants not guilty.

The defendant is not required to establish his innocence under our system of jurisprudence.

Now you may well ask what do we mean at law by a reasonable doubt? Well, it doesn't mean any percentage of what you believe of any witness' testimony. Percentages have nothing to do with it, and it doesn't mean any doubt whatsoever. Proof beyond a reasonable doubt is proof to a moral certainty, and not necessarily proof to a mathematical or a scientific certainty.

A reasonable doubt is one which is reasonable in view of all the circumstances of the case. Therefore, if after an impartial comparison and consideration of all the evidence, you can candidly say that you have such a doubt as would cause you to hesitate you [sic] to act in matters of importance to yourself, then you have a reasonable doubt, but if after such impartial comparison and consideration of all the evidence, and giving due consideration to the presumption of innocence which attaches to the defendants, you can truthfully say that you have an abiding conviction of [sic] the defendants, or any one of them, as to their guilt, such as you would not hesitate to act upon in the more weighty and important matters relating to your personal affairs, then, as to such defendant or defendants, you have no reasonable doubt. (Tr. 326-27.)⁸

This charge, applicable to every count, was given only moments before the specific charge on count four. That it was considered by the jury in connection with that count is made more certain by the recurrent reminders the court gave the jury that guilt must be proven beyond a reasonable doubt. (Tr. 325, 328, 330, 338.) See *Carey*

⁸ A very similar charge has been sustained by this Court. *McNeil v. United States*, 66 App. D.C. 199, 85 F.2d 698 (1936).

v. *United States*, 111 U.S. App. D.C. 300, 296 F.2d 422 (1961). In these circumstances the jury could not have been misled by the failure to include the "reasonable doubt" language in the count-four charge itself.

Nor could the court's charge on aiding and abetting have misled the jury.* Appellants complain that the

* This charge was as follows:

You may find anyone [sic] of the defendants guilty of the crimes charged in the indictment without finding that they personally committed each of the acts constituting the offense or even that he was personally present at the commission of the offenses.

Any person who advises, incites or connives to an offense or aids or abets the principal offender is as guilty of the offense as if he had personally committed each of the acts constituting the offense. A person aids and abets another in the commission of a crime if he knowingly associates himself in some way with the criminal venture with the intent to commit the crime, participates in it as something he wishes to bring about and seeks by some action of his to make it succeed. Some conduct by the defendant of an affirmative character in furtherance of the common criminal design or purpose is necessary. Mere physical presence by the defendant at the time and place of the commission of such offense is not by itself sufficient to establish his guilt, and it is not necessary that any specific time or mode of committing the offense shall have been advised or commanded or that the defendant, or the one in question, shall have committed or agreed to have committed it in any particular way, or [sic] is it necessary that there shall have been any direct communication between the actual perpetrator and the defendant.

Now, let's see how that [sic] aiding and abetting could apply in this case. If you believe that the four defendants in this case got in the car with Officer Spencer, and with the intent to rob him, or in fact did rob him, and that when they got in the car they intended to participate in this thing, or to have one or more of them participate in it, then they would be guilty of aiding and abetting in the crime, whether it was intent to commit robbery or whether or not it was robbery.

Now, as to assault with a dangerous weapon, the pistol, again, if they got in the car with the intent to rob or conceived the intent to rob and did rob, or did rob after they got in the car, then if, as a natural result thereof, and if one of the defendants threatened the officer with the pistol, under the elements of the crime as I have defined them to you, all the defendants would be guilty of assault with a

court's telling the jury that guilt would follow "if you believe [Officer Spencer]," exoneration "if you believe the defendants' testimony" created the impression that the Government need prove aiding and abetting by a mere preponderance of the evidence, or that appellants had the burden of proving this issue.¹⁰ This position cannot be sustained in view of the repeated emphasis given by the court to the reasonable doubt requirement and the protection it affords criminal defendants, both before and after the aiding and abetting instruction. A similar charge was recently approved by this Court in *Redfield v. United States*, 117 U.S. App. D.C. 231, 328 F.2d 532, cert. denied, 377 U.S. 972 (1964). Thus, appellants' attempt to isolate this single passage from the instructions as a whole and fault the trial judge is without merit, especially in view of their acceptance of the charge at trial.

C. The Self-Defense Charge.

Although appellants characterize the court's self-defense charge¹¹ as only peripherally mentioning the

pistol, and the same applies generally to the fourth count as to the stealing of the pistol.

Of course, if you believe the defendants' testimony that they got in the car perfectly innocently to be carried to a cabaret, then, of course, they had no necessary intent to commit any of these crimes, such as would permit you to find the defendants guilty under the aiding and abetting, although you could find a defendant who actually did the things that constitute the element of the crime, guilty. (Tr. 334-36.)

¹⁰ Brief for Appellants, pp. 25-27.

¹¹ This charge was as follows:

Now it is also the contention of the defendants that they acted in self-defense at the time of the occurrences alleged here. I will instruct you as to the law of self-defense.

If a defendant did not provoke an assault and incidentally, the self-defense would apply as to the third count, and not to any of the other counts, although it could apply to the larceny of the pistol, if they thought it was necessary to take it away for their protection. If a defendant did not provoke an assault

fourth count,¹² the charge as given sets out all the elements of self-defense as required by this Court in *Josey v. United States*, 75 U.S. App. D.C. 321, 735 F.2d 809 (1943) (see also cases collected in that opinion). The charge clearly told the jury that if appellants did not provoke Spencer's attack, and reasonably believed that he was about to "take life" or "do . . . serious bodily injury", they were "not required to retreat" but were "entitled to stand . . . [their] ground and meet force with force." The jury was specifically told that meeting an unprovoked attack with force could include taking the pistol if appellants "thought it was necessary . . . for their protection."

and at the time of the occurrence had reasonable grounds to believe and in good faith believed that the complaining witness was about to take his life or do him serious bodily injury, then a defendant is not required to retreat or consider whether he could safely retreat but is entitled to stand his ground and meet force with force and meet any attack made upon him by the complaining witness in such manner and with such force as under the circumstances of the case, as you find it, he may at the moment have honestly believed and had reasonable grounds to believe was necessary to save his life or to protect himself from serious bodily injury.

The use of such force as of the time appears reasonably necessary is justified, even though it may afterwards turn out that the appearances were false and there was in fact neither design to do serious injury nor danger that it would be done nor actual need to use such force in self-defense.

Generally, the defense of self-defense is not available to one who provokes the difficulty, and it is therefore for you to determine who was the aggressor, the defendant or the complainant and mere words, without more, are never considered proof of provocation. The law of self-defense is a law of necessity, real or apparent, and there must appear no other alternative in defending one's self before the use of force and of a dangerous weapon will be justifiable as excusable.

Now if as a result of all the evidence or lack of evidence a reasonable doubt has been engendered in your mind as to whether the defendants acted in self-defense, that doubt must be resolved in favor of the defendants, bearing in mind that the burden is upon the Government to establish that the defendants did not act in self-defense. (Tr. 336-38.)

¹² Brief for Appellants, pp. 19-21.

Appellants cannot urge that the court's failure to give a "defense of another" instruction prejudiced them in any way.¹³ The instruction given does not limit the scope of legitimate defense to "self" only. Moreover, if the jury had believed appellants' testimony and thought the law permitted a person to defend himself when attacked, but not to assist a companion, it would have acquitted Devone but convicted Boone. That both were convicted indicates that the jury disbelieved appellants' protestations of self-defense insofar as they related to taking the revolver.

D. Specific Criminal Intent.

Although appellants do not challenge the court's instructions on the necessity of finding an intent to commit the crime in themselves,¹⁴ they read *Morissette v. United States*, 342 U.S. 246 (1952), as establishing that, to sustain their conviction under § 2206, the jury must find appellants had knowledge that the property belonged to the District of Columbia in addition to an intent to unlawfully take property which they knew belonged to another.¹⁵ The *Morissette* case involved a conviction under 18 U.S.C. § 641 for theft of property from the United States.¹⁶ *Morissette* had come across steel bomb casings on government land while hunting deer. He salvaged several tons of these casings, testifying that he had considered them abandoned by the government. The trial court instructed the jury that it must convict *Morissette*

¹³ See Brief for Appellants, pp. 21-22. We assume *arguendo* that one is justified in going to the aid of another who has been unjustifiably assaulted, even when the victim is not a close relative. Cf. *Purdy v. United States*, 210 A.2d 1 (D.C. Ct. App. 1965). The issue seems not to have been resolved by this Court.

¹⁴ (Tr. 331-32). These instructions appear *supra*, note 4.

¹⁵ Brief for Appellants, pp. 15-19.

¹⁶ Although different in some respects from 22 D.C. Code § 2206, 18 U.S.C. § 641 can be regarded as identical with it for all purposes relevant to this appeal.

if it found that he took the property, irrespective of whether he reasonably considered it abandoned. Rejecting the argument that a specific criminal intent was not an element of the crime charged, the Supreme Court reversed Morissette's conviction, holding that the trial judge should have instructed the jury to acquit if it believed his testimony.

Adherence to *Morissette* clearly does not require reversal here. In that case, Mr. Justice Jackson established that a criminal intent is an element of all felonies deriving from common law crimes unless this requirement is expressly dispensed with by Congress. The concern of the Court was with the danger of "sweeping out of all federal crimes, except where expressly preserved, the ancient requirement of a culpable state of mind". 342 U.S. at 252. Morissette, if his testimony were believed, did not have any criminal intent whatever; his purpose was entirely innocent. This cannot be said of appellants. Even if, as they testified, they did not know Spencer was a police officer, the jury found that they did intend to take his gun. That Spencer happened to be a police officer and his gun government property escalates the penalty; but so long as appellants possessed a specific criminal intent to steal it, they should be held responsible for the natural consequences of criminal acts done in furtherance of that evil purpose. For example, if prosecuted for grand larceny, a hypothetical defendant would not be heard to complain that he had mistakenly believed the object taken to be worth a nominal value, and that he should be convicted only for the misdemeanor of petit larceny. It is the proof of actual value of the property, rather than the belief of the taker, which controls the degree of larceny. *State v. Hedge*, 87 Tex. Crim. Rep. 236, 229 S.W. 862, 864 (1921); 52 C.J.S. *Larceny* § 133 (1961). The present instance is not a case where a defendant took the property of one person while mistakenly believing it to be the property of someone whose permission he had, or where a defendant received property innocent of the knowledge it was stolen property. Appel-

lants may not claim to be absolved of crime because the owner whom they intended to deprive of the pistol proved to be a more formidable entity than they may have expected.¹⁷

None of the errors denounced in *Morissette* appears in this record. Criminal intent was found by the jury, not presumed by the judge. 342 U.S. at 273-76. The requirement of evil purpose or mental culpability was not "swept out" of the statute. Apart from *Findley v. United States*, 362 F.2d 921 (10th Cir. 1966), relied upon by appellant, *Morissette* has never been extended beyond situations where the defendant is ignorant that he has committed a crime, *Smith v. California*, 361 U.S. 147 (1959); *Levine v. United States*, 104 U.S. App. D. C. 281, 283-84, 261 F.2d 747, 749-50 (1958); *Rent v. United States*, 209 F.2d 893, 900 (5th Cir. 1954) (mistake of fact defense), or was unable to form a criminal intent, *Easter v. District of Columbia*, 124 U.S. App. D.C. 33, 37, 361 F.2d 50, 54 (1966); *Driver v. Hinnant*, 356 F.2d 761 (4th Cir. 1966) (chronic alcoholic incapable of forming the specific

¹⁷ Nor can *Pettibone v. United States*, 148 U.S. 197 (1893), reversing a conviction for obstructing the administration of justice in a federal court on the ground that the defendant did not know his activity, criminal under state law, violated a federal injunction, be relied upon as establishing that defendants in federal prosecutions must always know the precise federal facts which constitute their offense. For example, a majority of the federal circuits which have passed on the issue have held that to be convicted of assaulting a federal officer, one need not know that the victim is a federal officer if other elements of a criminal assault are present. *United States v. Wallace*, 368 F.2d 537 (4th Cir. 1966); *Lombardozzi v. United States*, 335 F.2d 414 (2d Cir.), cert. denied, 379 U.S. 914 (1964); *Bennett v. United States*, 285 F.2d 567 (5th Cir. 1960), cert. denied, 366 U.S. 911 (1961); *McNabb v. United States*, 123 F.2d 848, 855 (6th Cir.), rev'd on other grounds, 318 U.S. 332 (1942). *Contra: Chiaravalloti v. United States*, 60 F.2d 192 (7th Cir. 1932); *Walker v. United States*, 93 F.2d 792 (8th Cir. 1938). The majority rule also represents the trend of recent decisions: *Wallace* overruled *Owens v. United States*, 201 F.2d 749 (4th Cir. 1953), and *Bennett* and *McNabb* seem to have overruled *Hargett v. United States*, 183 F.2d 859 (5th Cir. 1950) and *Sparks v. United States*, 90 F.2d 61 (6th Cir. 1937).

intent necessary for the misdemeanor of drunkenness). We submit that *Findley* was aberrant and unwise, and that this Court should not require specific knowledge as to the pistol's ownership where a specific criminal intent has been proven.

CONCLUSION

WHEREFORE, it is respectfully submitted that the judgment of the District Court should be affirmed.

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REPLY BRIEF FOR APPELLANTS

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(1)

UNITED STATES COURT OF APPEALS
For The
DISTRICT OF COLUMBIA CIRCUIT

No. 20,803

WILLIAM D. MITCHELL,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20,804

EDDIE DEVONE,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

No. 20,805

FILED JUL 25 1967

WAYNE A. BOONE,

Appellant,

Nathan J. Paulson
CLERK

v.

UNITED STATES OF AMERICA,

Appellee.

No. 20,806

LANGFORD BEACHEM,

Appellant,

v.

UNITED STATES OF AMERICA,

Appellee.

On Appeal from the United States District
Court for the District of Columbia

David Booth Beers

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Attorney for Appellants
(Appointed by this Court)

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UNITED STATES COURT OF APPEALS
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No. 20,806

LANGFORD BEACHEM,

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REPLY BRIEF FOR APPELLANTS

ARGUMENT

The government in its brief stresses that the matters which we raise concerning the instructions to the jury were not presented by counsel to the court below. This we of course have conceded. The government also stresses that the trial court's instructions must be considered as a whole, and we do not dispute that proposition. The sole question, then, is whether or not the instructions were so deficient as to compel reversal under the "plain error" rule. Fed. R. Crim. P. 52(b). We believe that we have demonstrated in our opening brief that plain error was committed, and we shall here only briefly comment upon the manner in which the government treats the issues we raise.

Elements of the Offense. In our opening brief we asserted that the trial court failed to define or explain clearly the basic elements of the offense of stealing property of the District of Columbia. The government's response is to discuss only a few of the elements of the offense and to ignore others. Thus, the government states blandly that the instruction given "concisely elucidates the essential elements of a stealing offense. (Brief for Appellee, p. 7) However, the government ignores the fact that

the jury was not told it was being given the "essential elements of a stealing offense." The court commenced the instructions on this court by reading the language of the indictment, which used the terms "steal and purloin." The government's brief does not discuss the fact that "purloin" was never again mentioned, but it does appear to concede that "steal" was never defined. The court then continued, "....in order to constitute larceny...." The government argues that this was not error, because "....at common law and under related federal statutes 'stealing generally imports larceny.'" The fact remains that the jury was given to understand that the offense charged was stealing not larceny, and the jury was apparently left to devine that "stealing generally imports larceny". The government also asserts that "taking and intent...had already been delaborately discussed in other parts of the charge...", and, in any event, no charge was needed on "taking" because defendants admitted taking the gun. (Brief for Appellee, pp. 7-9). This argument is just as silly; for the charge on "taking" was with specific reference to an earlier count, and criminal intent was not charged at all. Moreover, appellants' testimony that they took the gun hardly removes the obligation to instruct on that element of the offense. Byrd v. United States, 119 App. D.C. 360, 342 F 2d 939, 941-2 (D.C. Cir. 1965). Finally, the government asserts that there was no need to instruct on "value" because value "can be presumed from.... utility." (Brief for Appellee, p. 9). Assuming that to be so, the jury was not told that it could entertain such a presumption.

The government offers nothing more. No attempt at all is made to explain that: carrying away was never mentioned to the jury; nor was the ownership of the property by the District of Columbia; the intent to deprive the owner of his property rights permanently was not discussed; and, most important of all, nowhere in the charge on this count did the court instruct that the government had to prove anything at all. When viewed as a whole, the charge on Court Four reveals a total failure to explain to the jury what was at issue and what had to be proved to warrant a conviction. Appellants were entitled to instructions as to each element of the offense, and it was plain error not to give them. Byrd v. United States, supra; Jackson v. United States, App. D.C. 348 F. 2d 772, 773-4 (D.C. Cir. 1965).

Scienter. We make only one principal observation on the government's argument on the issue of scienter. ^{1/} We do not rely primarily upon Morissette v. United States, 342 U.S. 246 (1952); for ownership by the federal government as opposed to ownership by a private person was not there directly in issue. While Morissette of course requires proof of specific ^{2/} criminal intent, Findley v. United States, 362 F. 2d 921 (10th Cir. 1966), absolutely requires that a defendant know or have reason to know of the governmental ownership of the property. The government's only answer in this case is to argue that Morissette is not entirely controlling, which we conceded in the first place, and to state without discussion that Findley "was aberrant and unwise." (Brief for Appellee, p. 17). As we demonstrated in our opening bri-

^{1/} We note that the government does not disagree with us that the issue was unavoidably raised by the evidence if we are correct on the law.

^{2/} We of course contend, supra, that specific criminal intent was not adequately charged.

(Br. pp. 15-18), not only is Findley sound, but the scienter requirement is even more clearly compelling under the statutory scheme of the District of Columbia Code where statutes other than that involved in these appeals cover the offenses of petit and grand larceny absent the specific intent to take from the government.

Self-defense. Our contention concerning self-defense is simply that the language which the trial court used to instruct on this issue created confusion as to whether or not, or under what circumstances, the defense applied to the stealing property count. First, the court stated that the defense could only apply to the assault charge; next the court contradicted itself by adding parenthetically, "although it could apply to the larceny of the pistol...." (Tr. 336). We do not contend that this contradiction alone justifies reversal; rather, we urge that this confusion was fatally compounded by the court's immediate return to the discussion of self-defense entirely within the context of a defense to an assault. The stealing property count was not mentioned again, and thus there was no instruction on the defense with reference to the evidence on Count Four. See Collazo v. United States, 90 App. D.C. 241, 196 F. 2d 573 (D.C. Cir. 1952). The government's argument boils down to the proposition that the "charge sets out all the elements of self-defense." (Brief for Appellee, p. 13). This may be so as to the elements of the defense in an assault charge, but the fact remains that the jury was given no guidance with respect to the sufficiency of the defense to a stealing property charge. Appellants' defense to Count Four rested upon justification for the taking, and they were entitled to have that issue explicitly and clearly presented to the jury.

Defense of Another. The government's very brief discussion of the issue of "defense of another" is frivolous. The government concedes that the doctrine is recognized in this Circuit and that no instruction was given. (Brief for Appellee, p. 14). It makes the remarkable statement that the "self-defense" instruction, which we urge was deficient in itself, "does not limit the scope of legitimate defense to 'self' only." (Id.) The instruction is discussed in detail in our opening brief. (Br. pp. 25-27). As we there demonstrate, it is entirely couched in terms of one who himself is being assaulted. The issue was simply never put before the jury, and conceding this, the government suggests that we may speculate that if the jury had been confused it would have acquitted one appellant (Devone) while convicting another (Boone). (Brief for Appellee, p. 14). But speculation may be tempting to all parties to these appeals in view of the multiplicity of offenses charged and issues which were either presented or should have been presented to the jury. The short answer is that, even if the instructions were otherwise free from error, the jury could have found that Appellant Devone, although entitled to the defense, acted unreasonably in defense of himself, while Boone acted quite reasonably in defense of Devone.

Burden of Proof. At the very beginning of the government's discussion of the burden of proof instructions it is correctly stated that we urge reversal on the ground that the trial court did not instruct the jury that the government had to prove each element of the offense beyond a reasonable doubt. (Brief for Appellee, p. 9). Presumably it is because there is no answer to that charge that the government does not refer to it again. Rather, the government's brief discusses the instruction defining burden of proof, which we do not attack, and from this somehow

concludes that "the jury could not have been misled by the failure to include the 'reasonable doubt' language in the count four charge itself." (Brief for Appellee, p. 11).

Thus, the government has no answer to the mandate of this Court that the jury in a criminal case must be told "at least once , in some unequivocal language" that it must acquit if it believes that the government "has not proved each and every element of the crime beyond a reasonable doubt." Williams v. United States, 76, App. D.C. 299, 131 F. 2d 21, 22 (D.C. Cir. 1942). And this Court has said it again and again. McAfee v. United States, 70 App. D.C. 142, 105 F. 2d 21, 29 (D.C. Cir. 1939) ("tell the jury once in precise terms that a not guilty verdict is necessary in the event of failure by the Government to prove each of the elements of some offense beyond a reasonable doubt"); McKenzie v. United States, 75 App. D.C. 270 , 126 F. 2d 533, 536 (D.C. Cir. 1942) ("beyond a reasonable doubt that all of the elements of the crime charged existed") ; Byas v. United States, 86 App. D.C. 309, 182 F. 2d 94 (D.C. Cir. 1950) ("the essential elements of the crime would have to be proved by the Government beyond a reasonable doubt"); Byrd v. United States, 119 App. D.C. 360, 342 F. 2d 939, 940 (D.C. Cir. 1965) ("the burden upon the Government to prove every essential element").

Aiding and Abetting. The government apparently does not deny that the language used by the Court in the aiding and abetting instruction appears to give the jury the choice only of believing the government or of believing appellants. Rather, the government pins its hopes of escaping reversal on this ground solely upon the instructions on burden of proof. It asserts that appellants' position cannot "be sustained in view of the

repeated emphasis given by the court to the reasonable doubt requirement and the protection it affords criminal defendants...." (Brief for Appellee, p. 12). Since the court never instructed the jury that the government must prove each element of the offense beyond a reasonable doubt, the government's argument seems wonderfully presumptuous. The suggestion that this case is akin to Redfield v. United States, 117 App. D.C. 231, 328 F. 2d 532 (D.C. Cir. 1964), doesn't help. Contrary to the assertion in the government's brief, this Court did not "approve" the erroneous instructions on burden in Redfield; the Court said reversal was not compelled inasmuch as the other instructions were so clearly right and fair to defendant. In the present case, even if the other instructions on burden of proof are not considered fatally defective in themselves, they certainly cannot be said to be so clear and fair as to cure the defects in the aiding and abetting instruction.

CONCLUSION

The attitude of the government in its brief reflects the atmosphere of the trial below. Just as the trial court seems to have paid little heed to the fourth count of the indictment and concentrated its instructions on the first three counts, so the government here, to the extent it discusses the issues at all, relies heavily upon what the jury was told about the other offenses charged. We have here a case very much like Williams v. United States, supra, where this Court remonstrated that "the charge as a whole gives the impression of a tacit assumption that some kind of a verdict of guilty would be returned." 131 F. 2d at 23. The problem is that the jury, apparently acting contrary to expectations, acquitted on the first three counts but convicted on the fourth. What once perhaps seemed an unnecessary appendage to the trial proceedings now results in

sending four men to prison. We submit that this result cannot be permitted without a fair and thorough presentation to a jury of what this particular charge involves and what the government had to prove to sustain a conviction.

Respectfully submitted,



Dated: July 25, 1967

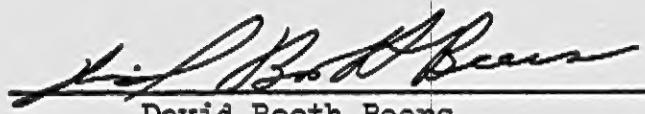
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CERTIFICATE OF SERVICE

I hereby certify that I have this 25th day of July, 1967 served the foregoing upon Appellee United States of America by causing copies thereof to be delivered to the office of the United States Attorney, United States Court House, Washington, D.C.



David Booth Beers